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consequent right to her time, and the loss of that time, wrongfully occasioned, is damage to her.

We invite special attention to the case of *Harmon v. Old Colony R. R. Co.*, very recently decided by the Supreme Judicial Court of Massachusetts, ante, at p. 9. See what is there said as to the right of a married woman under the Massachusetts statutes to her time, and observe the great similarity, indeed sameness in some respects, of the statutes of Massachusetts and Virginia on the subject. The Virginia statute, in this particular, was taken substantially from the Massachusetts statutes, as will readily be seen by comparison. There is an absence of desirable harmony in the judicial decisions on the particular question, as may be seen by an examination of Mr. Elliott's excellent note appended to the Massachusetts case; but his conclusion is, that the better reason and the weight of authority are with that case.

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ANDERSON V. HYGEIA HOTEL COMPANY.\*

*Virginia Court of Appeals*: At Richmond.

March 12, 1896.

1. LIMITATIONS—*Actions for personal injuries.* An action to recover damages for personal injuries caused by the wrongful act, neglect or default of any person or corporation must be brought within one year from the time such injury was inflicted.
2. APPELLATE COURT—*Writs of error, how disposed of.* Writs of error in the Court of Appeals must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment complained of. If, as the law then stood, there is no error in the judgment it must be affirmed, but, if erroneous, it must be reversed and such judgment entered as the lower court ought to have entered.

Error to a judgment of the Circuit Court of Elizabeth City county, rendered September 13, 1893, in an action of trespass on the case wherein the plaintiff in error was the plaintiff, and the defendant in error was the defendant. *Affirmed.*

The opinion states the case.

*Burroughs & Brother* and *Borland & Wilcox*, for the plaintiff in error.

*A. S. Segar*, *Thomas Tabb* and *Ro. M. Hughes*, for the defendant in error.

RIELY, J., delivered the opinion of the court.

The plaintiff was injured by falling into an open pit, filled with hot oil, which was on the premises of the defendant company; and brought

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\* Reported by M. P. Burks, State Reporter.

suit to recover damages for the injuries he had sustained. The accident happened on January 12, 1892; the suit was not instituted until June, 1893.

The defendant pleaded the statute of limitations; the plaintiff demurred to the plea; and the court overruled the demurrer and gave judgment for the defendant. The correctness of the ruling of the court depends upon the construction of sec. 2927 of the Code, which is as follows:

“Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued.”

The determination of the question, whether the limitation of *five* years or of *one* year applies in this case, necessitates an inquiry as to what actions terminate with the life of the person. It was a rule of the common law, that if an injury was done either to the person or the property of another, for which damages only could be recovered in satisfaction, the action therefor died with the person, to whom, or by whom, the wrong was done. “In actions merely personal,” says Blackstone, “arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives.” Book 3, p. 302. See also Broom’s Legal Maxims, 874; Lomax on Exors. (2d ed.), 470; and 4 Minor’s Institutes, Pt. 1, 703.

Certain innovations have by degrees been made by statutes upon this rule, which have considerably altered it. The statute of 4 Ed. III, ch. 7, gave to executors an action for goods and chattels of their testators carried away in their lifetime; and this being a remedial law was liberally construed. The Legislature of Virginia early repealed the English Statutes, and enacted in their place a similar statute, to be found in I Revised Code of 1819, ch. 104, sec. 64. And it is now provided that a personal representative may sue or be sued “for the taking or carrying away any goods, or the waste or destruction of, or damage to, any estate of or by his decedent.” Section 2655 of the Code.

But while the rule of the common law has been much restricted and limited by statutes both in England and in this country, and the right

to sue for an injury done to the *property* or *estate* of the decedent in his lifetime has been conferred on the personal representative of the deceased, the rule has not been altered in this State in respect of an injury done to the *person*. An action for an injury to the *person* still, as at common law, dies with the person, and no right of action for such injury *survives* to his personal representative. Therefore, for an injury to the person, the action must, under the provisions of sec. 2927 of the Code, be brought within one year from the time the right of action accrues, which is the time when the injury was sustained.

It is sought to take this case out of the rule of the common law by virtue of the provisions of secs. 2902 and 2903 of the Code, whereby it is provided that, "whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* against said ship or vessel, or *in personam* against the owners thereof or those having control of her," the person who, or corporation or ship which, would have been liable, if death had not ensued, shall be liable to an action for damages; and that every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent, and child of the deceased. It is further provided that the amount recovered shall, after the payment of costs and attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or if they have not directed, according to the statute of descents and distributions, and "shall be free from all debts and liabilities of the deceased," except where there are no such kindred, in which case they shall become assets of the estate.

It is further provided by sec. 2906 of the Code, that "the right of action under sections 2902 and 2903 shall not determine, nor the action, when brought, abate by the death of the defendant, or the dissolution of the corporation when a corporation is the defendant; and, where an action is brought by a party injured for damage caused by the wrongful act, neglect, or default of any person or corporation, and the party injured dies pending the action, and his death is caused by such wrongful act, neglect or default, the action shall not abate by

reason of his death, but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections 2902 and 2903, and the case proceeded with as if the action had been brought under the said sections.”

It was claimed and earnestly contended in argument that the effect of these statutes is to cause the right of action for an injury to the person, which is produced by the wrongful act, neglect, or default of another and death is the result of such injury, to survive, and to alter, in such case, the rule of the common law, that an action for an injury to the person dies with the person; so that the limitation upon the right of action in the case at bar would be, under the provisions of sec. 2927 of the Code, five years, and not one year. This is, however, a mistaken view.

No action at law being maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, the British Parliament in 1846 passed what is commonly known as “Lord Campbell’s Act,” which was entitled “An act for compensating the families of persons killed by accidents.” The Virginia Act (secs. 2902–2906 of the Code) is modeled upon Lord Campbell’s Act, and, in its essential features, is substantially the same.

The language of the Act clearly indicates that the Legislature had in view the rule of the common law; and that its purpose in passing the Act was to provide for the case of an injured person, who had a good cause of action, but died from injuries without having recovered his damages. It is intended to withdraw from the wrong-doer the immunity from civil liability which the rule of the common law afforded him, and to provide for the recovery of such damages, notwithstanding the death of the injured person. In doing so, however, it plainly did not intend to continue or cause to survive his right of action for the injury, but to substitute for it and confer upon his personal representative a new and original right of action. *Blake v. R. Co.*, 83 E. C. L. R. 93; *Pym v. R. Co.*, 116 Do. 396; *Read v. R. Co.*, 18 L. T. R. (N. S.) 822; *Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357; *Seward v. Vera Cruz*, 10 Appeal Cases, L. R. 59; *Martin v. B. & O. R. R. Co.*, 151 U. S. 673, 696; *Jeffersonville R. Co. v. Swayne’s Adm’r*, 26 Ind. 459; *Burns v. R. Co.*, 113 Ind. 169; *Hulbert v. City of Topeka*, 34 Fed. Rep. 510; *Legg v. Britton*, 24 Atl. Rep. 1016; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor &c.*, 89 N. Y.

27; *Hegerich v. Keddie*, 99 N. Y. 258; and *Tiffany's Death by Wrongful Act*, sec. 23.

It is very clear that this new right of action, though founded upon a wrong already actionable by existing law in favor of an injured person for his damages, was not intended to be, and is not, a derivative one. A brief consideration of the general principles of the Act will demonstrate the correctness of this view.

Where the right of action, which the deceased person had in his lifetime, survives, his personal representative sues as the legal owner of the personal estate which has passed to him in course of law, and the recovery is for the benefit of and constitutes assets of the estate of the decedent, with the consequent liability for the payment of his debts.

The right of action of the personal representative is the same that was possessed by the deceased in his lifetime. It proceeds on the same principles, is sustained by the same evidence, and the measure of recovery is the same.

But very different is the right of action given by the Act in question.

The Act requires the suit to be brought by and in the name of the personal representative, but he by no means sues in his general right of personal representative. He sues wholly by virtue of the statute and in respect of a different right. His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased, who are designated in the statute.

If the effect of the statute is, as was contended, to cause the right of action of the injured person to survive, the suit by his personal representative would be to recover damages for the injury the deceased had sustained and the detriment caused to his estate. The same kind of evidence would be necessary and admissible to support the action that would be proper if the injured person himself were suing. There would be the same elements of damage for the consideration of the jury in assessing the damages. The evidence would mainly relate to and the damages be for the physical and mental suffering of the deceased and the injury and loss generally sustained by him and his estate. But in a suit by the personal representative under the statute, the evidence would primarily relate to and the damages be not only for the pecuniary loss the wife, husband, parent, or child, as the case might be, had sustained, but it would be proper for the jury, in com-

puting the damages, to take also into consideration the grief and mental anguish of such relatives and their loss in being deprived of the care, attention, and society of the deceased, and to include therefor in the verdict such sum as the jury might deem fair and just. *B. & O. R. R. Co. v. Noel's Adm'r*, 32 Gratt. 394, and *Matthews v. Warner's Adm'r*, 29 Do. 570.

The limit of recovery, too, is different. In the one case the amount of recovery is limited only by the amount of the loss that may be proved; in the other, the recovery cannot in any case exceed ten thousand dollars.

Then again: If the action were only a survival of the right of action of the injured person, the recovery would constitute assets of his estate and be subject to the payment of his debts, whereas it is expressly declared by the statute that the amount recovered under the statutory right of action, except where there are no such kindred as are designated by the statute, shall be "free from all debts and liabilities."

And, further: It was not any more intended by sec. 2906 than by secs. 2902 and 2903, nor has it any more effect, to cause the right of action of the injured person to survive within the meaning of sec. 2927.

It is the right of action given by secs. 2902 and 2903 to the *personal representative* of the injured person that the first clause of sec. 2906 causes to survive upon the death of the wrong-doer, if he be a person, or the dissolution of the corporation, if the wrong-doer be a corporation, and not the right of action which the injured person had in his lifetime. The section contains no provision for the survival of his right of action in such event. That determines either with his own death or the death of the wrong-doer.

The residue of sec. 2906 was simply intended to prevent delay and save the trouble and expense of a new suit, when all these had already been incurred by the injured person, who had brought his suit and died before recovering his damages. But for sec. 2906, all the delay, cost, and expense, which he had incurred in his lifetime in bringing and maturing his suit for trial would be useless and incurred in vain if he died before the trial; but without precluding the right of his personal representative to bring a new suit within twelve months after his death for the same cause of action and recovering such damages therefor as to the jury might seem fair and just, not exceeding the limit fixed by the statute. This provision of sec. 2906 was wisely enacted

to prevent the estate of the decedent from being unjustly mulcted with costs, and to facilitate a recovery for the injury.

Sufficient has been said to show that the Act does not affect the rule of the common law, and does not cause to survive within the meaning of sec. 2927 the right of action for an injury to the person by the wrongful act, neglect, or default of another. Such right of action still, as at common law, dies with the person, and the limitation of one year applies in such case. *Curry v. Town of Mannington*, 23 West Va. 14; *Flint v. Griffin*, 3 S. E. R. 33; and *Martin v. R. Co.*, *supra*.

It is proper, however, before concluding this opinion, to advert to the Act of January 29, 1894 (Acts of 1893-94, p. 83), amending sec. 2906, which was invoked by counsel in support of their contention of the survivability of the right of action of the plaintiff in error within the meaning of sec. 2927. What effect, if any, that Act may have in other cases on the question we have been considering, it is unnecessary to decide, and we do not now mean to express any opinion, one way or the other. It can have none in this case.

The judgment in this case was rendered September 13, 1893, and the Act above referred to was passed January 29, 1894. The judgment was final prior to the enactment of the statute. This is not (except in a few cases specified in the Constitution) a court of original but appellate jurisdiction, and the writ of error must be disposed of in accordance with the law as it existed at the time of the rendition of the judgment. This court must affirm it, if there is no error therein according to the law as it stood when the judgment was rendered, and, if erroneous, reverse it and enter such judgment as the Circuit Court "ought to have entered." Sec. 3485 of the Code; *Currin et als. v. Spraul et als.*, 10 Gratt. 145, 148; *Kennaird etc. v. Jones*, 9 Gratt. 183, 190; *N. & W. R. R. Co. v. Doherty*, decided at the November term; *Kansas P. R. Co. v. Twombly*, 100 U. S. R. 78; and *Wright v. Graham*, 42 Ark. 140. As was said by Judge Samuels, in delivering the opinion of the court in *Currin et als. v. Spraul et als.*, *supra*, "If a party shows a defence valid at the time it is passed on by the court, a subsequent change in the law cannot deprive him thereof."

There is no error in the judgment of the Circuit Court, and the same is affirmed.

*Affirmed.*

BY THE EDITOR.—The decision and opinion in this case call for no comment. They are so clearly right that they will command the universal approval of the profession. We have been attracted rather to what was not decided—not decided because not required—the construction of the Statute of 1894 (Acts of

1893-94, p. 83) referred to in the opinion. Suppose the cause of action in this case had arisen after, instead of before, the passage of that Act; would the limitation of one year or five years have applied?

The construction of this amendatory act abounds in difficulties. It is hard to determine the precise object and scope of the amendment. The plain intent of the original section (2906) was to prevent abatement of the action by the death of either plaintiff or defendant pending the action. If the action was brought by the personal representative under secs. 2902 and 2903, it was provided that the death of the defendant or the dissolution of the corporation, if a corporation was the defendant, should not determine or abate the action. It was foreseen, that if the party injured by the wrongful act, neglect, or default of another, brought an action in his life-time to recover damages for the injury, and died, it matters not from what cause, while the action was pending, the common law rule, *actio personalis moritur cum persona*, would apply and the action would determine *ipso facto*. Hence, it was further provided, that when the action was brought by the party injured and he dies pending the action, and his death is caused by the injury complained of, the action should not thereby be determined but might be revived in the name of his personal representative, with such change in the pleadings as to make the action conform to an action brought under secs. 2902 and 2903. In short, as explained in the opinion of the court in the principal case, the revivor was but a substitution of one action for another—the action authorized by secs. 2902 and 2903 for the pending action by the party injured, and thus avoid the necessity of a new suit. It was essential, however, to this constructive substitution, that the death of the plaintiff pending the action should be caused by the wrongful act, neglect, or default complained of. Now, the section (2906) as amended and reenacted omits the provision that the death shall have been caused by wrongful act, neglect, or default, and also omits the provision as to change of pleadings. What, then, was the object of the amendment? It would seem, that the purpose was to prevent abatement by the death of the plaintiff pending the action of every suit brought to recover damages for wrongful act, neglect, or default, whether the death was caused by such wrongful act, neglect, or default, or not. The result of this construction would be, that the action would survive and, under sec. 2927, the limitation would be five years and not one year as before. This is certainly a very radical change. To make our meaning clearer, we illustrate: A is assaulted and beaten by B and brings his action against B to recover damages for the injury. Pending the action A dies, but his death is not caused by the assault and battery for which the suit is brought. Under the construction suggested, A's suit does not abate by his death, but may be revived by his personal representative; and hence, under sec. 2927, in such a case the limitation of the right of action would be five years, as "no limitation is otherwise prescribed." And this rule would apply to all other pending actions for damage caused by the wrongful act, neglect, or default of another. We suppose, however, (we confess we do not know) that the term "wrongful act," &c., as used in section 2906, taken in connection with its use in the preceding sections, means some physical personal injury and therefore would not include slander, libel, and the like.

Suppose Anderson, the plaintiff in the principal case, had brought his suit for a cause of action arising after the Act of 1894, claiming in his declaration damages exceeding \$10,000, say, \$20,000, and had died pending his action and it was shown

that his death was caused by the "wrongful act, neglect, or default" of the defendant: could the recovery in that case have exceeded \$10,000, the limit prescribed in a suit by his personal representative under sec. 2903? Or might not the recovery have extended to the amount claimed in the declaration? If the latter, then we have the anomaly of greater damages being allowed when death does not ensue from the injury than when it does.

Again, in case of revivor of the pending action, when the death of the plaintiff is caused by the wrongful act, &c., of the defendant, and a recovery is had, are the proceeds to be distributed as provided by sec. 2904, or are they to be considered and treated as a part of the estate of the decedent as in ordinary cases?

These questions and others likely to arise under the Act of 1894 will come to perplex the bar and torment the courts.

The Act, to make the best of it, is a most bungling piece of legislation.

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NYE V. LOVITT AND ANOTHER.\*

*Virginia Court of Appeals: At Richmond.*

March 26, 1896.

1. *DEEDS—Construction of—Technical words—Heirs of the body.* Technical words are presumed to have been used technically, unless the contrary appears on the face of the instrument; and words of definite legal signification are to be understood as used in their definite legal sense. Applying these rules to the case at bar, the grant to "Jane C. Lovitt, for and during her natural life, and at her death then to the heirs of her body and their heirs forever," gave to the heirs of the body of Jane C. Lovitt a contingent remainder in the lands conveyed, and the persons answering the description of "heirs of her body" at the time of her death took a fee simple estate. There is nothing in the deed to require the words "heirs of her body" to be given other than their technical and ordinary meaning.
2. *DEEDS—Construction—Looking to the deeds.* In construing one deed, another deed from the same grantor to a different grantee and in reference to a different subject-matter cannot be looked to in order to ascertain the meaning of the grantor in the first deed.
3. *ESTOPPEL—After-acquired title—Married women uniting with trustee to convey equitable separate estate.* A grantor of land who has conveyed with a warranty or covenant of title is estopped from setting up an after-acquired title against his grantee, and, although there is no warranty, the grantor will be estopped from asserting an after-acquired title against his vendee where the deed of conveyance recites or affirms that the grantor is seised of a particular estate which the deed purports to convey and upon the faith of which the sale was made. But this doctrine does not apply to a married woman holding an equitable separate estate, who unites with her trustee merely for the purpose of showing that the trustee was making the conveyance with her knowl-

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\* Reported by M. P. Burks, State Reporter.